ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of

Implementation of Sections 3(n) and 332 of the Communications Act

GN Docket No. 93-252

Regulatory Treatment of Mobile Services

COMMENTS OF
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Summary

US MobilComm, Inc. ("USM") was founded in 1993 to build, manage and operate major market wireless voice and data networks of individually owned, licensed and controlled five-channel 220 MHz systems. The Commission's Further Notice of Proposed Rulemaking ("FNPRM") in this docket requests comment on modifications to the technical, operational, and licensing rules for commercial mobile radio services, including 220 MHz services. The FNPRM also incorporates a filing by SunCom Mobile & Data, Inc. addressing the regional licensing of 220 MHz networks.

USM favors the promulgation of Commission rules that would foster the creation of regional 220 MHz mobile radio networks. These networks will enhance the ability of the 220 MHz service to carve out a market niche so that it may competitively provide mobile dispatch services. Such rules should include a clarification of Section 90.739 of the Commission's Rules to allow entities to acquire multiple systems within 40 miles of each other provided that each system is fully operational and is part of the regional network. USM supports a reasonably rapid deployment of 220 MHz network service, allowing 220 MHz regional networks until December 2, 1996 to fully phase in construction, with interim milestones to ensure that service is offered to the public as soon as practical. Finally, USM proposes that once the Commission lifts the freeze on 220 MHz applications, that it first accept only modification applications for a brief period of time, to give current licensees an opportunity to improve their facilities unhindered by mutually exclusive applications from new parties.

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COMMENTS OF
US MOBILCOMM, INC.

US MobilComm, Inc. ("USM"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415 (1992), hereby submits its comments on the Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket.[1/] USM's Comments address issues relating to the implementation of commercial 220-222 MHz local service ("220 MHz") as one of the many land mobile communications services. The FNPRM incorporated into the Docket a Petition for Declaratory Ruling and Request for Rule Waiver filed by SunCom Mobile & Data, Inc. ("SunCom") (February 1, 1994). FNPRM at ¶ 38. These Comments also represent USM's Counterproposal to SunCom's Petition/Request.

As discussed below, USM favors the promulgation of Commission rules that would foster the creation of regional 220 MHz mobile radio networks. USM believes that such networks are necessary if 220 MHz systems are to be able to successfully serve

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1/ Further Notice of Proposed Rulemaking, Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, GN Docket No. 93-252, FCC 94-100 (May 20, 1994).

the voice dispatch market niche for which this spectrum is suited. USM further believes that some extension in the construction deadline is required to allow the construction of such networks to be coordinated and managed prudently and economically. However, as opposed to the *eight* years proposed by SunCom, USM supports a limited extension which will ensure that licenses are constructed and commercial 220 MHz service is offered to the public in a timely manner. Therefore, USM proposes that the Commission allow 220 MHz regional networks an additional *two* years beyond the December 2, 1994 deadline to phase in construction, with interim milestones to ensure that service is offered to the public as soon as practical. Finally, USM proposes that once the Commission lifts the freeze on 220 MHz applications, that it first accept only modification applications from current licensees for a brief period of time, to allow current licensees to improve their facilities without the threat of mutually exclusive applications from new parties.

I. Background

1. USM is a Delaware corporation whose principals have extensive experience in the operations and/or marketing of cable television, specialized mobile radio ("SMR"), cellular and broadcast television systems. USM commenced operations in early 1993 with the goal of building and operating major market wireless voice and data networks of commercial trunked five-channel 220 MHz systems (the "Network"). USM's strategic plan is to build, manage and operate the Network, which would initially

serve most of the top 100 markets in the country, with up to 10 five-channel trunked systems in each market. The Network will consist of individually owned, licensed and controlled systems whose licensees have come together under USM's common management umbrella.

2. USM has assembled a network of prominent industry operating companies throughout the country who will be active in the construction of USM's networks and the sale of its services to end users. In October 1993, after nine months of research and establishing a distribution network, USM invited participation of 220 MHz licensees in the USM networks. A large number of licensees have executed management agreements with USM in the nation's top markets. USM began construction of its Networks in Baltimore, Maryland in May 1994. During the summer of 1994, USM will have systems constructed in additional top markets, including New York, Philadelphia, Baltimore, Washington, as well as in South Florida from West Palm Beach to Miami. Prior to December 2, 1994, USM will also have 220 MHz systems in operation in the Boston, Chicago, Dallas, Houston, Los Angeles, San Francisco and Sacramento markets. As USM establishes operational core systems in the target markets, it will develop additional systems until meeting the Network requirements.[2/]

3. The commercial land mobile radio marketplace is highly competitive. Cellular, wide-area SMR, and personal communications services offer, or will soon offer, large channel

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[2/] USM is also commencing its process of entering into agreements for most of the remaining top 100 markets.

capacity, wide service areas, and a multitude of features, including full duplex service. This multitude of features is being offered to a very broad consumer and commercial market.

4. The FCC established commercial 220 MHz service in 1992, envisioning it as the first band allocated exclusively for the provision of two-way narrowband mobile services.[3/] The majority of local commercial 220 MHz licenses consist of five-channel blocks of paired narrowband (5 kHz) channels. In contrast to the broad consumer and commercial market to which cellular, wide-area SMRs and PCS will market their services, 220 MHz voice services will be marketed only to the relatively small traditional voice dispatch market.

5. The Commission's public interest mandate imbues the Commission with an obligation to establish services in a regulatory environment that will foster their growth and development. Absent such a regulatory environment, traditional voice dispatch users demanding wide area service (which inevitably will be increasingly required in the marketplace) may be forced away from the usage pattern that they need and want and onto one of the broader application Commercial Mobile Radio Services ("CMRS"). The traditional voice dispatch market will be a small and insignificant part of the total target market for these other service providers, which will lead to a significant

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[3/] Report and Order, Amendment of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Services, PR Docket No. 89-552, 6 FCC Rcd 2356 (1991) ("220 Report and Order"), recon., 7 FCC Rcd 4484 (1992).

risk that this traditional market will be underserved and overpriced.

6. While small and insignificant to the cellular, wide-area SMR and PCS operators, the traditional voice dispatch user is the market niche which 220 MHz was intended to reach and is USM's target market. Given the appropriate regulatory environment, 220 MHz can well serve this market niche, offering smaller-scale groupings of systems within various market areas with roaming capability between markets. The instant FNPRM seeks comment on how to most effectively structure this regulatory environment for all CMRS providers, including the 220 MHz industry.

7. The FCC has granted the first round of 220 MHz licenses and the subject systems are just beginning to become operational. Due to the initial uncertainty created by a judicial appeal of the 220 MHz application filing procedures, all 220 MHz non-nationwide licensees have been granted an extension until December 2, 1994 to construct their systems and commence operations.[4/]

4/ Order, Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 9 FCC Rcd 1739 (1994). "Constructed/operation" under the Commission's rules requires full construction of all five channels, plus the serving of two mobiles per five-channel system. All future-authorized licensees of non-nationwide 220 MHz stations must comply with Section 90.725(f) of the Commission's Rules by constructing their facilities and placing them in operation within eight months of the date of initial license grant. 47 C.F.R. § 90.725(f). The purpose of this rule is to "promote utilization," since only applicants prepared to immediately construct will apply for licenses. 220 Report and Order, 6 FCC Rcd at 2366 ¶ 76. Thus, this rule was promulgated to discourage lottery speculators.

II. Discussion

A. The Commission Should Encourage the Development of 220 MHz Regional Networks

8. The FNPRM at ¶ 38, requests comment on whether to allow regional licensing of 220 MHz systems, and if so, what regulatory restrictions would be appropriate to ensure comparable treatment to similar mobile services. USM believes that, given the extremely small amount of spectrum granted to each 220 MHz licensee and the economic realities of competition in today's land mobile communication marketplace, the only potential for successful utilization of a five-channel commercial narrowband license is as part of a multi-site system offering full market coverage, feature-rich equipment and depth of channel capacity. Generally, a five channel stand-alone system is simply not economically feasible. Furthermore, the demand for regional two-way mobile services networks is indicated from the rapid growth of 800 MHz and 900 MHz SMR regional systems. Therefore, it would serve the public interest for 220 MHz providers to meet this demand. The Commission should encourage and enhance the ability of all local 220 MHz licensees to join regional networks such as the one proposed by USM.

9. In addition, the Commission should clarify that Section 90.739 of the rules does not prohibit an entity from acquiring multiple systems within 40 miles of each other *provided that* prior to any such acquisition, each of the systems is fully operational and is committed to being part of a regional

network.[5/] In other words, the Commission should clarify that Section 90.739 was meant to avoid a situation where one entity has multiple *unconstructed* individual systems within 40 miles of each other. Since, by definition, a fully operational licensee is serving users, aggregation of operational systems in the context of a regional network does not lead to warehousing by entities not planning to construct. Rather, it promotes utilization of the spectrum by facilitating the development of regional systems.

B. The Commission Should Establish a Reasonably Rapid Phased-In Construction Schedule for 220 MHz Network Systems

10. To more effectively implement regional networks, USM requests that the Commission create a phased-in implementation schedule for network construction. Network managers are constructing as well as managing their licensee-affiliates. Forcing the entire network to be fully operational by December 2, 1994 is an unrealistic burden on the network managers. As the Commission noted in the FNPRM at ¶ 60, "Services that are technically more complex and/or that will cover large geographic areas are typically afforded longer construction periods." Indeed, the Commission has adopted multi-year construction periods for many of its Part 90 wide area services, usually

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[5/] "No licensee will be authorized more than one system in the 220-222 MHz band in a single category . . . within [ ] (40 miles) of an existing system authorized to that licensee in the same category, unless the licensee can demonstrate that the additional system is justified on the basis of its communications requirements." 47 C.F.R. § 90.739.

combined with interim coverage milestones to ensure that service is offered to the public as soon as practical.[6/]

11. Similarly, the Commission should adopt a phased-in construction plan for commercial 220 MHz local licensees planning to be part of a regional network. However, the Commission must balance the implementation time needed for deployment of a regional system with the need to make available 220 MHz service on a speedy basis. The eight year time period proposed by SunCom does not come anywhere near meeting this second regulatory objective. See SunCom Request for Waiver at 13.

12. An eight year construction schedule would undermine the desire of equipment manufacturers to participate in what is already considered to be a relatively small market, and may well threaten the financial viability of their 220 MHz projects. In addition, an eight year construction schedule would probably lead to an increase in speculative accumulation of spectrum that could undermine the potential for 220 MHz systems to successfully compete in the marketplace. Moreover, SunCom's proposed milestones (15% of markets constructed in two years; 100% of markets constructed in eight years) require no completion of any portion of its network by the Commission's December 2, 1994 deadline. This period of time is much longer than necessary to set up a regional network of 220 MHz licenses, considering that 220 MHz equipment is currently available and the licenses have

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6/ See, e.g., 47 C.F.R. § 90.725(a)-(e) (nationwide 220 MHz); 47 C.F.R. § 90.727 (non-commercial 220 MHz); 47 C.F.R. § 90.629 (wide area SMRs; licensees need waiver); 47 C.F.R. § 90.496 (929-930 MHz private carrier paging; licensees need waiver).

been issued. While giving no explanation for its rather lengthy extensions, SunCom's proposal merely drags out construction, unnecessarily delaying service to the public, and, as a result, is inconsistent with the public interest. Therefore, SunCom's proposed extended construction schedule should be rejected.

13. USM does recognize, however, that the numerous factors and confusions which have delayed implementation of 220 MHz systems have led to a reality in which full construction of regional networks prior to December 2, 1994 is not feasible. As long as a proposed network operator can prove that specific action on construction has begun on its network, it should be allowed reasonable additional time to complete construction. USM therefore proposes that the Commission grant 220 MHz regional networks until December 2, 1996 to complete a phased-in construction schedule, with the following interim milestones to ensure that services are offered to the public in a timely manner:

a) By October 3, 1994, the network operator must file with the FCC a network plan, which would include a list of licenses that it will be constructing and managing, and a certification from each licensee that it is part of the network. Unless a licensee has certified that it is part of a network by October 3, 1994, it cannot qualify for the regional construction schedule. The FCC schedule should encourage licensees to move forward with diligence. Since it is likely that stand-alone licensees would be unable to construct on a timely basis by waiting until after October 3, 1994 to begin construction, the proposed deadline encourages licensees to make the decision on how to construct on a timely basis. Therefore, a licensee that has not signed with a network by October 3, 1994 and has not constructed by December 2, 1994, loses its license.

b) By December 2, 1994, the network must have constructed and placed into operation at least one five channel system in at least each of 10 of the top 30 markets as

defined at Section 90.741 of the Commission's rules, 47 C.F.R. § 90.741. This will assure that service will be available to a reasonable portion of the proposed network by the expiration of the Commission's original deadline and will demonstrate the network manager's seriousness and ability to implement its full construction schedule.[7/]

c) By December 2, 1995, the network must have constructed and placed into operation at least one five channel system in each of the remaining markets that it proposed to construct. This will ensure that service will be available in each market within the Network by December 2, 1995.

d) By December 2, 1996, the network must complete construction of all channels in all markets. This will allow additional channels to be added as subscriber growth justifies, rather than making an upfront investment prior to significant subscriber revenues.

14. By following the above phased-in construction schedule, 220 MHz networks can meet the FCC's objective of bringing service to the public within a reasonable time frame and at the same time bring to a minimum the delays that would otherwise be caused by licensees returning unconstructed licenses to the Commission, resulting in the need for beginning the licensing process all over again.[8/]

7/ The reason for emphasizing construction in the top 30 markets as proposed herein is because these are the markets with the most critical public demand by end users to use SMR-like 220 MHz services. In the top 30 markets, channel use is high and little channel capacity is left on the currently authorized 800 MHz and 900 MHz SMR operations. In contrast, although there is a waiting list for SMR licenses in markets below the top 30, these markets still have much unused capacity in the 800 MHz and 900 MHz SMR licensee systems; therefore, it is more critical for 220 MHz services to build more quickly in the top 30 markets.

8/ Indeed, the prophylactic purposes of this rule, to discourage lottery speculators, see supra note 4, no longer exist, since the Commission can no longer assign these licenses by lottery.

C. The Commission Should Allow Current 220 MHz Licensees the Opportunity to Modify Their Systems Before Accepting New 220 MHz Applications

15. On a related construction issue, as the Commission is aware, there is a freeze on new applications for 220 MHz services, presumably including modifications of license.[9/] The pendent judicial appeal of 220 MHz licensing procedures delayed system construction to such an extent that many base station locations originally applied for became unavailable or economically unfeasible for 220 MHz systems. In some cases, tower owners have leased to capacity, or the site lease became too expensive due to intervening increase in demand for such sites. In other cases, licensees found coverage improvement at a different site. Because of the modification application freeze, licensees are required to get Special Temporary Authorizations (STAs) to relocate in time to construct and operate by the December 2, 1994 deadline. Licensees who have already constructed under STAs will have to modify their licenses as soon as the freeze on applications is lifted to make the STA changes permanent, and to avoid the license being cancelled pursuant to the STA expiration. Licensees who have not yet constructed will also need to modify their licenses to obtain more suitable antenna sites.

9/ See Order, Acceptance of 220-222 MHz Private Land Mobile Applications, 6 FCC Rcd 3333 (1991). The Commission imposed the freeze so that it could process those applications already tendered to the FCC prior to accepting new applications.

16. However, the Commission will be reopening the filing period for 220 MHz and is considering the possibility of accepting applications for new licenses at the same time it accepts applications for modifications of existing systems. If both are filed on the same day, then applications for modifications will be mutually exclusive with applications for new licenses, resulting in both applications being subject to lottery or comparative hearing. FNPRM at ¶ 133.[10/] This makes little sense. Licensees who have invested in construction and operation and are already serving the public, or who are committed to a regional network which is in the roll-out process, should be allowed to perfect their systems without concern of mutual exclusivity with a new entrant.

17. Therefore, it is in the public interest that the Commission maintain the freeze on 220 MHz applications for new systems, and accept modification applications from current licensees for a brief period of time, to allow current licensees to improve their facilities without the threat of a mutually exclusive application being filed by a new party.

18. Moreover, in some instances, the Commission will be unable to grant an application for permanent modification due to various technical reasons such as short spacing. Rather than cancel the original license and shutting down existing facilities where operators have invested in construction and operation and

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[10/] Modifications generally cannot be subject to auction. FNPRM at ¶ 120; Second Report and Order, PP Docket No. 93-253, FCC 94-61 (April 20, 1994), at ¶¶ 37-40 (citing H.R. Rep. No. 111, 103d Cong., 1st Sess. 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580).

are providing service to the public, it makes sense to return the application for modification and allow the applicant 60 days to bring the modification into compliance with the technical issues raised by the Commission, again without the threat of a new entrant filing a mutually exclusive application. The continuity of service resulting from a corrected modification is always in the public interest.

Conclusion

For the above stated reasons, USM respectfully urges the Commission to adopt its regulations regarding the regulatory treatment of commercial 220 MHz local services in accordance with the above proposals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Renee Gray, a secretary to the law firm of FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P., hereby certify that on this 20th day of June, 1994, I served a true copy of the foregoing "**COMMENTS**" by first class United States Mail, postage prepaid, upon the following:

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